

APPEAL NO. 030831
FILED MAY 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 27, 2003. The hearing officer determined that (1) the respondent (claimant) sustained a compensable injury on _____, to his cervical, thoracic, and lumbar spine; (2) the injury extends to include the neck and mid back; (3) the claimant had disability from May 5, 2002, through the date of the hearing; and (4) the appellant (carrier) waived the right to dispute compensability of the claimed injuries, because it failed to contest the injury in accordance with Section 409.021. The carrier appeals the injury and disability determinations on sufficiency of the evidence grounds. The carrier also appeals the waiver determination, asserting legal and factual error. The claimant did not file a response.

DECISION

Affirmed.

INJURY AND DISABILITY

The hearing officer did not err in making the complained-of injury and disability determinations. The determinations presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

WAIVER

The hearing officer did not err in determining that the carrier waived the right to dispute compensability of the claimed injury. It is undisputed that the carrier first contested the claimed injury more than seven days after receiving written notice of the injury. The carrier contends, however, that it did not waive its right to dispute the claimed injury, under Section 409.021, because no benefits were immediately due and owing to the claimant. In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), we interpreted Section 409.021 to require that a carrier take some action within seven days of receiving written notice of an injury, and we admonished that a carrier which does nothing and later asserts that it "intended to pay in accordance with

the 1989 Act [when benefits accrued],” does so at its own risk. Accordingly, we will not reverse the hearing officer’s waiver determination on this basis.

The carrier next asserts that the hearing officer’s waiver determination is legal error, because the claimant did not have an injury. The carrier cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). In Williamson, the court held that “if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.” The Appeals Panel has recognized that Williamson is limited to situations where there is a determination that the claimant had no injury, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant’s employment. Texas Workers’ Compensation Commission Appeal No. 020941, decided June 6, 2002. The hearing officer found, in this case, that the claimant sustained injuries to his cervical, thoracic and lumbar spine, on December 22, 2001. As indicated above, such findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, we perceive no error.

The carrier finally contends that it did not waive its right to dispute the claimant’s cervical and thoracic spine, asserting that this presented an extent-of-injury not a waiver issue. Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to “extent of injury” disputes. Notwithstanding, we have said that that rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an “extent issue” and thereby avoid the mandates of Section 409.021. See Texas Workers’ Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers’ Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers’ Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers’ Compensation Commission Appeal No. 022183, decided October 9, 2002. The evidence shows and the hearing officer found that the primary claimed injury included the cervical and thoracic as well as the lumbar spine. As such, the carrier was obligated to dispute the compensability of the claimed cervical and thoracic injuries in accordance with Section 409.021. The carrier failed to do this. Accordingly, the hearing officer properly determined that the carrier waived its right to dispute the claimant’s cervical and thoracic injuries.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRINITY UNIVERSAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**DONALD GENE SOUTHWELL
10000 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75265.**

Edward Vilano
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge